

14. Hungary

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1. Relevant Legislation and Case-law

Freedom of information

By obtaining information, journalists can rely on the regulations on freedom of information and the legal practices associated therewith. Public data have been accessible to everyone since 1992. The conditions that apply to public information access were partially modified by the legislator in 2011 (Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information). The previous system governing freedom of information, which had worked well, was severely curtailed by Parliament in 2015.⁸⁹⁴

According to the effective statute, public data designates any type of data and information - irrespective of the method or format in which they were recorded - that is handled by and/or refers to the activities of anybody or person that discharges state or municipal government functions, or other public duties provided for by the relevant legislation, including data generated in the performance of their respective public duties, regardless of how these data are handled or of the way in which they were collected. This includes in particular data

"regarding powers and competencies, organizational structures, professional activities and the evaluation of such activities covering various aspects thereof, such as efficiency, the types of data held and the regulations governing operations, as well as data relating to financial management and to contracts concluded."

Public data are publicly available and may be accessed by anyone. The law specifies the data request procedure in detail, mindful of the interests of the person submitting the data request. A data request may be submitted in any form, even electronically, and the data manager is bound by a strict, 15+15 days deadline. The person requesting the data is not liable to pay for any costs related to accessing the data, with the potential exception of the costs related to producing copies thereof. In cases of failures to satisfy data requests, the law provides for judicial remedies; in practice, the greatest impediment to the freedom of information is that such legal actions can become excessively drawn out. In addition to providing for the possibility of data requests, the law also obligates those handling

⁸⁹⁴ The increasing severity of the relevant provisions applies in particular to the following issues: an end to anonymous data requests; the repayment for expenses that must be rendered in exchange for data provision will in the future also include the labour costs associated with the handling of the data; in case of works of protected by copyright, freedom of information requests may be satisfied by offering an examination of the documents rather than producing copies thereof data used in decision-making processes may not be disseminated if they "serve as the basis for future decision-making.

public information to make publicly available certain types of data on the internet.

Another way of accessing public data is the publication of the legally specified data on the internet. The data should be accessible by anyone, without a requirement of personal identification and completely devoid of any restrictions. It should be available for printing and for copying in all its details without any loss or distortion of data. Its downloading, printing, copying and network transmission should also be made possible free of charge. The data to be published is specified by the so-called publication lists. The general publication list applicable to all bodies that handle public data is contained in the act on freedom of information, and it includes organisational and personnel data, as well as data regarding the respective organisations' activities, operations and financial management.

The misuse of the public data is a crime.⁸⁹⁵

Limits on the freedom of information

The regulations offer some specified exceptions to the public availability of public data; these exceptions offer very little margin of appreciation in terms of what may or may not be withheld. These exceptions are state secrets (classified data), data connected to a decision-making process, personal data and business secrets. However, most of exceptions are not absolute limits on the freedom of information, the regulation ensures the possibility of considerations.

Classified data are regulated in the Act CLV of 2009 on the Protection of Classified Data. The law requires data, of which disclosure may cause a damage to the public interest, to be classified. The classification has to meet formal and substantive criteria.⁸⁹⁶ The abuse of the classified data is a crime punished with imprisonment.⁸⁹⁷ In 2015, the Hungarian

⁸⁹⁵ Act C of 2012 on the Criminal Code Section 220: (1) Any person who, in violation of the statutory provisions governing access to public information: a) withholds public information from the requesting party, or refuses to disclose public information in spite of being ordered to do so by final court ruling; b) falsifies or renders inaccessible any public information; or c) provides access to or publishes any public information that is untrue or has been falsified; is guilty of a misdemeanour punishable by imprisonment not exceeding two years. (2) The penalty shall be imprisonment not exceeding three years for a felony if the misuse of public information is committed for unlawful financial gain.

⁸⁹⁶ See Act CLV of 2009 Sections 4-6.

⁸⁹⁷ Act C of 2012 on the Criminal Code Section 265 (1) Any person who: a) obtains or uses any classified information; b) discloses any classified information to an unauthorized person, or withholds such information from a competent person; is guilty of criminal offences with classified information. (2) The penalty shall be: a) custodial arrest for a misdemeanour where the

Constitutional Court declared that

*“the process of classifying data needs to be subject to a substantive review that may be directly initiated and does not merely look at the effectuation of formal and procedural criteria, but also extends to an evaluation of the decision to classify a document as confidential; whether the decision is well-founded; and whether the limitation of the public sphere it gives rise to is both necessary and proportional.”*⁸⁹⁸

The proceedings of the Constitutional Court were initiated by the investigative portal Átlátszó.hu. The portal sought to obtain information on the names and positions of employees at the Ministry of Foreign Affairs, while the Ministry classified these data as confidential.⁸⁹⁹

information is classified as restricted data; b) imprisonment for a felony not exceeding one year where the information is classified as confidential; c) imprisonment not exceeding three years where the information is classified as secret; d) imprisonment between one to five years where the information is classified as top secret. (3) Where criminal offences with classified information are committed by a person authorized for using classified information under the strength of law and it involves information classified as restricted, confidential, secret or top secret, such person is punishable by imprisonment not exceeding one year or two years, or between one to five years or two to eight years in accordance with the distinction made in Subsection (2). (4) Any person who engages in preparations for criminal offences with classified information as under Paragraphs c)-d) of Subsection (2), shall be punishable for a misdemeanour by imprisonment not exceeding two years, or for a felony by imprisonment not exceeding three years in accordance with the distinction made therein. (5) Where a person authorized for using classified information under the strength of law engages in preparations for criminal offenses with classified information as under Paragraphs c)-d) of Subsection (2), shall be punishable by imprisonment not exceeding three years or by imprisonment between one to five years in accordance with the distinction made therein. (6) Any person authorized for using classified information under the strength of law, who commits the criminal offense defined in Subsection (2) by way of negligence shall be punishable for misdemeanour by custodial arrest, or by imprisonment not exceeding one year, two years or three years in accordance with the distinction made therein. Section 266 (1) Protection under criminal liability shall also apply - for a period of thirty days from the time when classification is requested - to any data recommended for classification, where the classification procedure is pending at the time when the act was committed, and if the perpetrator is aware thereof. (2) Cases of criminal offenses with classified information may be prosecuted exclusively only on the basis of a motion by the body or person vested under the Act on the Protection of Classified Information with authority for the classification of the information involved.

⁸⁹⁸ Decision of the Constitutional Court IV/26/2013.

⁸⁹⁹ *Sepsi Tibor*: Csátát veszítettünk, de háborút nyertünk az Alkotmánybíróságon a visszaélésszerű titkosítókkal szemben [We lost a battle but won a war in

Freedom of information is limited by the data connected to a decision-making process, as well. According to the law⁹⁰⁰, any information compiled or recorded by a body with public service functions as part of, and in support of, a decision-making process for which it is vested with powers and competence, shall not be made available to the public for ten years from the date it was compiled or recorded. Access to these information may be authorized by the head of the agency that controls the information in question upon weighing the public interest in allowing or disallowing access to such information. But a request for disclosure after the decision is adopted may be only rejected, if disclosure is likely to jeopardize the legal functioning of the body with public service functions or the discharging of its duties without any undue influence, such as in particular the freedom to express its position during the preliminary stages of the decision-making process on account of which the information was required in the first place.

In 2014, the Hungarian Constitutional Court decided that

"it constitutes a serious violation of the right to freedom of information when the data manager only justifies its decision to restrict access to data by claiming the information is needed in the course of a decision-making process, without substantiating this claim."

The publication of data used in decision-making processes may only be denied if

*"the data manager denies the provision of data on the basis of constitutionally justifiable reasons and only to an extent that may be considered essential for the realisation of the underlying objective."*⁹⁰¹

In the proceedings concerning the freedom of information request submitted by Átlátszó.hu,⁹⁰² the Constitutional Court held that "in the interest of the assertion of the right to freedom of information, any limitation that withholds with definite effect a piece of data or an entire document from the public, or which comprehensively limits public access to entire documents, regardless of their content, must be regarded as incompatible

the Constitutional Court against abusive classification practices], Átlátszó.hu, 15 February 2015, <http://blog.atlatszo.hu/2015/02/csatat-vesztettunk-de-haborut-nyertunk-az-alkotmanybirosagon-a-visszaelesszeru-titkositokkal-szemben/>.

⁹⁰⁰ Act CXII of 2011 Section 27 (5)-(7).

⁹⁰¹ Decision of the Constitutional Court 5/2014. (II.14.).

⁹⁰² On the case see MagyarLeaks: Kehi-jelentés az Operaház korrupciógyanus ügyeiről [MagyarLeaks: The report of the Government Control Office (KEHI) on Opera-related cases that raise the suspicion of corruption], Átlátszó.hu, 14 October 2013, <http://atlatszo.hu/2013/10/14/magyarleaks-kehi-jelentes-az-operahaz-korrupciogyanus-ugyeirol/>.

with the Fundamental Law [the Hungarian constitution]. The entirety of a document may not be classified as data used in a decision-making process."

In its decision rendered in 2015, the court ordered the Prime Minister's Office to turn over the entire texts of studies it had ordered for 5 billion forints to the journalists who had submitted the corresponding freedom of information request. During the proceedings, the court rejected the argument of the Prime Minister's Office that the studies are data used in decision-making.⁹⁰³

Further limits on the freedom of information are the trade (business) secrets. According to the Civil Code, trade secrets shall include any fact, information and other data, or a compilation thereof, connected to economic activities, which are not publicly known or which are not easily accessible to other operators pursuing the same economic activities, and which, if obtained and/or used by unauthorized persons, or if published or disclosed to others are likely to imperil or jeopardize the rightful financial, economic or commercial interest of the owner of such secrets, provided the lawful owner is not subject to actionability in terms of keeping such information confidential.⁹⁰⁴ The misuse of the trade secrets can be compensated by damages and other civil law sanctions⁹⁰⁵, and it is also can be punished by the Criminal Code.⁹⁰⁶

⁹⁰³ Hidvégi Fanny: TASZ siker: nem titkolhatóak a Századvég-tanulmányok [Success for TASZ: Studies by Századvég may not be classified], 19 June 2015, ataszjelenti.blog.hu/2015/06/19/tasz_siker_nem_titolhatóak_a_szazadvég-tanulmányok.

⁹⁰⁴ Act V of 2013 on the Civil Code Section 2:47.

⁹⁰⁵ Act V of 2013 on the Civil Code Section 2:51: (1) The right to the protection of privacy shall, in particular, cover the confidentiality of correspondence protection, professional secrecy and commercial secrecy. (2) Invasion of privacy shall, in particular, cover the unauthorized access to and use of private secrets, including publication and disclosure to unauthorized persons. (1) A person whose personality rights have been violated shall have the right to demand within the term of limitation - based on the infringement - as appropriate by reference to the circumstances of the case: a) a court ruling establishing that there has been an infringement of rights; b) to have the infringement discontinued and the perpetrator restrained from further infringement; c) that the perpetrator make appropriate restitution and that the perpetrator make an appropriate public disclosure for restitution at his own expense; d) the termination of the injurious situation and the restoration of the previous state, and to have the effects of the infringement nullified or deprived of their unlawful nature; e) that the perpetrator or his successor surrender the financial advantage acquired by the infringement according to the principle of unjust enrichment.

⁹⁰⁶ Act C of 2012 on the Criminal Code Section 418. Any person who illegally

As of 2003, enterprises that use public funds or public assets may not invoke the business secret exception in the range of their activities connected to public funds or public assets. According to the law, data related to their use of public funds and public assets must be public available.⁹⁰⁷ So the publishing of these does not violate the law.

In its legally binding decision of 2013, the court stated that based on the above, the contracts concluded between public service media and their sub-contractors cannot be classified as confidential business information, wherefore they have to be made accessible to the public.⁹⁰⁸

Protection of personal data and privacy

acquires, uses, or discloses a business secret for financial gain or advantage, or makes it available to others or publishes such information, causing pecuniary injury to others is guilty of a felony punishable by imprisonment not exceeding three years.

⁹⁰⁷ Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information Section 27: (3) Any data that is related to the central budget, the budget of a local government, the appropriation of European Union financial assistance, any subsidies and allowances in which the budget is involved, the management, control, use and appropriation and encumbrance of central and local government assets, and the acquisition of any rights in connection with such assets shall be deemed information of public interest, and as such shall not be deemed business secrets, nor shall any data that specific other legislation prescribes - in the public interest - as public information. Such publication, however, shall not include any data pertaining to protected know-how that, if made public, would be unreasonably detrimental for the business operation to which it is related, provided that withholding such information shall not interfere with the availability of, and access to, information of public interest. (3a) Any natural or legal person, or unincorporated business association entering into a financial or business relationship with a sub-system of the central budget shall, upon request, supply information for any member of the general public in connection with such relationship that is deemed public under Subsection (3). The obligation referred to above may be satisfied by the public disclosure of information of public interest, or, if the information requested had previously been made public electronically, by way of reference to the public source where the data is available. (3b) If the person referred to in Subsection (3a) refuses to comply with the request for information, the requesting party may initiate the proceedings of the authority delegated to exercise judicial oversight. (4) Access to public information may also be limited by European Union legislation with a view to any important economic or financial interests of the European Union, including monetary, fiscal and tax policies.

⁹⁰⁸ Court Decision Nr. 2.Pf.21.460/2013/4.; See Jogerősen nyilvánosak az MTVA alvállalkozói szerződésai – közzétesszük őket [The contracts that the Media Support and Asset Management Fund (MTVA) concludes with subcontractors must be made public pursuant to legally binding judgment - we are publishing them], Átlátszó.hu, 22 January 2014, <http://atlatszo.hu/2014/01/22/jogerosen-nyilvanosak-az-mtva-alvallalkozoi-szerzodesei-kozzetesszuk-oket/>.

Freedom of information is limited by the personal data. Personal data means any information relating to the data subject, in particular by reference to his name, an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity, and any reference drawn from such information pertaining to the data subject.⁹⁰⁹ However, the name of the person acting on behalf of a body with public service functions shall be considered information of public interest, including his job description and responsibilities, title and other personal data that may be of interest relating to the public function, as well as all other personal data that is to be made public by law.⁹¹⁰

A striking example of the conflict between personal data and the freedom of information in Hungarian jurisprudence is the requirement to obscure the faces of police officers depicted in the performance of their duties. For years, the consistent position in jurisprudence was that the face of a police officer performing official acts could only be presented in the media with the permission of the officer in question. According to Hungary's supreme court, the Curia, "the performance of official duties or work by a person in a public location or a public venue does not qualify as a public appearance, and hence any image or audio recording that makes the person uniquely identifiable may only be published with the consent of the person in question."⁹¹¹ Several NGOs appealed the Curia's unity of the law decision before the Constitutional Court.⁹¹² However, in 2014 the Constitutional Court adopted a position that ran counter to the established jurisprudence.⁹¹³ The Court held that "an image recorded in a public location may be published without express permission as long as it is part of a media coverage on an issue of public interest, and as long as it depicts the person in question objectively and without offending him/her." According to the decision, "the image recorded of police action may be published without the express consent of those depicted as long as the

⁹⁰⁹ Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information Section 3.

⁹¹⁰ Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information Section 26 (2).

⁹¹¹ Court Decision Nr. 1/2012. BKMPJE.

⁹¹² Ha a rendőrnek nincs arca, nincs felelőssége sem 2.0. - Az AB elé vittük az ügyet [If the police officer is without a face, then she is also without responsibility 2.0 - We took the issue to the Constitutional Court], Eötvös Károly Institute, <http://www.ekint.org/ekint/ekint.news.page?nodeid=603>; Az Alkotmánybíróságon támadjuk a rendőrök arcának kötelező kitakarását [The requirement to obscure the faces of police officers in reporting is before the Constitutional Court], Átlátszó.hu, 31 May 2013, <http://atlatszo.hu/2013/05/31/az-alkotmanybirosagon-tamadjuk-a-rendorok-arcanak-kotelezo-kitakarasat/>.

⁹¹³ Decision of Hungarian Constitutional Court 28/2014. (IX. 29.).

publication is not self-serving, in other words if in consideration of the circumstances of the case it may be deemed as visual coverage of current events or of the exercise of public power, which is an issue that the public has a legitimate interest in." The decision also holds that the deployment of police at demonstrations is always considered a current event, which is why images depicting the latter may be publicly disseminated without the consent of those whose image was recorded, as long as it does not violate the dignity of police officers. Based on the Constitutional Court's decision, the Curia set aside its previous unity of the law decision.⁹¹⁴

Journalists may only process personal data with the consent of the data subject. The conditions for handling personal data are governed by Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information, which does not contain specific provisions concerning media. The consent of the data subject is valid if it was provided voluntarily and if it is unequivocal and, moreover, based on adequate prior information. Consent may also be given implicitly with behaviour that implies consent.⁹¹⁵ With regard to the public dissemination in the media of personal data, the Media Law makes the following additional stipulations concerning consent: Media content providers are required to show an interview made for public presentation to the person interviewed or participating in media content upon his/her request before publication; however, such may not be broadcast or published if the person affected refused consent for broadcasting or publication because the media content provider made changes in or distorted the interview as to substance, to the detriment of the person interviewed or participating in the media content.⁹¹⁶ According to the law, the media content provider may not conclude an agreement with a person participating in media content that contains any clause to violate the integrity and reputation of the person participating in media content or to restrict his/her right to privacy within the framework of the agreement, or to restrict his/her right to withdraw the interview or participation. Any such clause is null and void.

A violation of the rules concerning the handling of personal data may result

⁹¹⁴ Sáriné Simkó Ágnes: Kell-e a rendőr hozzájárulása a róla szolgálat teljesítése során készült fotó nyilvánosságra hozatalához? [Does the police officer need to consent to the publication of her image recorded while she was discharging her duties?] PTK2013.hu, 17 February 2015, <http://ptk2013.hu/szakcikkek/kell-e-a-rendor-hozzajarulasa-a-rola-szolgalat-teljesitese-soran-keszult-foto-nyilvanossagra-hozatalahoz/4789>.

⁹¹⁵ Except for so-called special data, where the law requires written consent.

⁹¹⁶ Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content Section 15.

in an obligation to pay damages,⁹¹⁷ but it may also result in criminal law⁹¹⁸ consequences. Moreover, in such an instance the violation of media law provisions may lead to the application of media law sanctions as well.

2. Obtaining of information and boundaries of law enforcement

Illicit access to data

Illicit access to confidential private information or the violation of the privacy of correspondence results in civil and criminal law sanctions.

According to the Civil Code, the right to the protection of private secret shall, in particular, cover the confidentiality of correspondence protection, professional secrecy and commercial secrecy. Invasion of privacy shall, in particular, cover the unauthorized access to and use of private secrets, including publication and disclosure to unauthorized persons.⁹¹⁹

Illicit access to data is a crime according to the Criminal Code.⁹²⁰ Any person who, for the purpose of unlawfully gaining access to personal data, private secrets, trade secrets or business secrets:

- covertly searches the home or other property, or the confines attached to such, of another person;
- monitors or records the events taking place in the home or other property, or the confines attached to such, of another person, by technical means;
- opens or obtains the sealed consignment containing communication which belongs to another, and records such by technical means;

⁹¹⁷ Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content Section 23.

⁹¹⁸ Act C of 2012 on the Criminal Code Section 219 (1) Any person who, in violation of the statutory provisions governing the protection and processing of personal data: a) is engaged in the unauthorized and inappropriate processing of personal data; or b) fails to take measures to ensure the security of data; is guilty of a misdemeanour punishable by imprisonment not exceeding one year. (2) The penalty in accordance with Subsection (1) above shall also be imposed upon any person who, in violation of the statutory provisions governing the protection and processing of personal data, fails to notify the data subject as required, and thereby imposes significant injury to the interests of another person or persons. (3) Any misuse of personal data shall be punishable by imprisonment not exceeding two years if committed in connection with special data. (4) The penalty shall be imprisonment not exceeding three years for a felony if the misuse of personal data is committed by a public official or in the course of discharging a public duty.

⁹¹⁹ Act V of 2013 on the Civil Code Section 2:46.

⁹²⁰ Act C of 2012 on the Criminal Code Section 422.

- captures correspondence forwarded by means of electronic communication networks - including information systems - to another person and records the contents of such by technical means

is punishable by imprisonment not exceeding three years. Disclosure or using of any personal data, private secret, trade secret or business secret obtained by these ways are also crime. Publishing the data in the media can cause a significant injury of interests what is a ground for a more serious punishment.

This section is applicable in all cases of hidden information obtaining, from interception of phone messages to the using of hidden camera. However, there is no case law on these sections.

Media law entitles the Hungarian media authority (Media Council) with broad competences to investigate the activity of media providers.⁹²¹ Lots of the original rules from 2010 were found unconstitutional by the Constitutional Court,⁹²² and the Media Council has not uses this means in the practice.

According to the media act, the Media Council is entitled to inspect, examine and make duplicates and extracts of any and all medium containing data, document and written instrument - even if containing business secrets - related to media services, publication of press products and/or broadcasting, in order to ascertain the relevant facts of the case. The Constitutional Court found this rule constitutional, because in its interpretation the law

*“does not endow the Authority with the investigative authority to conduct proceedings that require preliminary judicial or prosecutorial rulings. This is why the petitioner is wrong in claiming that the Authority is entitled to enter the official premises or other publishing premises of the client or other parties to the proceedings, and to examine documents there in the framework of investigative-type activities.”*⁹²³

Media Council may also order the client, and other parties to the proceedings to make a statement and to supply data and information, as well as other information either verbally or in writing. A witness may be heard on the business secret of the client even if he was not granted

⁹²¹ Act CLXXXV of 2010 on Media Services and on the Mass Media Section 155-156.

⁹²² Constitutional Court Resolution No. 165/2011. (XII. 20.) AB. On the decision see Gábor Polyák, Krisztina Nagy, Hungarian Constitutional Court: New Media Regulation partly under Constitutional Scrutiny. Ruling No. 165/2011. (XII. 20.) AB, Vienna Journal on International Constitutional Law 2013/1. 110-116.

⁹²³ Constitutional Court Resolution No. 165/2011. (XII. 20.) AB.

exemption from the obligation of confidentiality from the client.

In case of obstruction of the proceedings, Media Council may impose an administrative fine upon the client, and any other party to the proceedings if, they act or behave in such a manner as to prolong or obstruct the proceedings or to prevent the actual facts of the case from being established. The maximum amount of the administrative fine shall be twenty-five million forints, one million forints in the case of natural persons. In addition, in case of repeated offence a fine upon the infringer's executive officer can also be imposed, for any case of obstruction of the proceedings or for breaching or non-compliance with the obligation to data disclosure, in an amount up to three million forints.

As a limitation of the investigative competences, Media Council may not order media content providers and the persons they employ under contract of employment or some other form of employment relationship to supply information or to surrender any document, asset or written instrument, if this would expose the identity of any person from whom they receive information relating to the media content they provide. Further, any document, asset or written instrument obtained during or for the purpose of communications between the client and his legal representative, or that is a record of the contents of such communications, provided in all cases that the nature of these documents is readily apparent from the document, asset or written instrument itself, may not be admissible as evidence, they may not be examined or seized, and the holder of such document, asset or written instrument may not be compelled to produce them for the purpose of inspection.

In particularly justified cases, Media Council may resort to the written instruments, data, documents and other means of evidence generated in the course of its proceedings also for the purposes of another proceeding, where deemed necessary for reducing the procedural burden on clients or for proper and effective application of the law.

Further, media service provider has to retain the authentic documentation relating to their programs, including the full record of the output signal of the media services on the whole, for a period of sixty days from the date of broadcast or in case of on-demand media services, from the last date of accessibility of content. For the purposes of regulatory inspection, Media Council may order media service providers to make available said authentic documentation relating to their programs to the Authority without delay and free of charge within the time limit prescribed for retention.

Confiscation, seizure of media products

According to the Criminal Code, media products, in which a criminal act is

realized, shall be confiscated.⁹²⁴ During the criminal process, media products can also be seized.⁹²⁵

Surveillance

Conducting surveillance of journalists or other citizens is allowed only regarding law enforcement or crime prevention goals. Investigating authorities and national secret services can reach the contents without the target-person's knowledge only if it is allowed them by the judge upon request of the prosecutor. The target should be only the suspect or the potential perpetrator of a crime, or the person whose surveillance is unavoidable in respect of these circumstances. Surveillance can be ordered only if the committed or the preventable crime is punishable for more than 5 years in prison, or the law particularly specifies it (ie: abuse of authority, child-pornography, human trafficking etc.).⁹²⁶ There is no evidence to date the state has conducted unlawful surveillance of its journalists.

3. Reporting about on-going investigations

No such type of duty is expressly laid down in Hungarian law. *Act CIV of 2010 on the fundamental rules of press freedom and media contents* (Smtv.) – also referred to as the Media Constitution, which seeks to define fundamental principles that apply uniformly to all media, provides the following rules under the heading obligations of the press:

Art. 13. In their news shows, linear media services performing information activities are obliged to report in a balanced manner on local, national and European events that are of public interest, as well as on events and public debates that are of importance to Hungarian citizens and the members of the Hungarian nation. The detailed rules of this obligation must be laid down in law, in accordance with the principle of proportionality and the requirement of providing adequate conditions for democratic opinion-formation.

This rule does not give rise to a general obligation to provide information, it only lays down the fundamental requirements of balanced and objective information.

This rule is complemented by Article 12 (1) of *Act CLXXXV on media service and mass communication*, which mandates that the information activities of media services need to be in compliance with Article 13 of the Smtv.

⁹²⁴ Act C of 2012 on the Criminal Code Section 72.

⁹²⁵ Act XIX. of 1998 on the Criminal Procedure Code 151.

⁹²⁶ Act XIX. of 1998 on the Criminal Procedure Code Sections 200-204.

A frequently criticised element of the law is the obligation to provide balanced, unbiased information. At the recommendation of the European Commission, this obligation was originally extended by the legislature to also include on-demand media services. Since this failed to consider the difficulties of implementing the obligation in respect of on-demand services, however, its actual application was limited to radio and television media services. This obligation, in a similar form, was part of the previous media law as well. The extension of the regulation is still a cause for concern: The Constitutional Court stated in a 2007 opinion that balanced and unbiased information may only be required of public service media outlets and radio and television companies that "have a significant impact on the formation of public opinion".

According to the media laws, linear media services engaged in the pursuit of information activities are required to ensure that with respect to programmes on local and national events of interest to the public, as well as on European events and public debates which are of interest, the newscasts and news programmes they provide are diverse, factual, timely, objective and balanced. They must ensure balanced information in their coverage and, depending on the nature of the particular programmes, within the given programmes or as part of the series of programmes shown regularly. The implementation of balanced service is a special procedure according to which the media service provider and the complainant confer with each other and, as a result, the authority obliges the service provider to publish either specific information or the complainant's point of view.

The Council of Europe's expertise proposed to do away completely with the Media Council's right to proceed. As a result of an agreement between the Council of Europe and the government, the text of the law was amended, but this has no substantial impact on the application of the law. As a result of the amendment, the requirements of diversity, factuality, timelines and objectiveness were removed from the law, leaving only the balanced coverage requirement. The amendment was justified on the grounds that these characteristics impose vague requirements that television channels and radio stations would find difficult to meet. Given that in judicial case-law balanced coverage is construed as a comprehensive category that encompasses all these aforementioned requirements as well, in practice the amendment does not imply that the scope of the relevant provision becomes narrower.

According to the Media Council,

"the only standard for assessing whether coverage is balanced is the proportion of opposing views it presents, the way these are conveyed and, based on an assessment of these factors, the quality of the information provided to the viewers and listeners."

As opposed to previous official and judicial practices, the Media Council

does not apply diversity, factuality, timeliness and objectivity of information as distinct requirements. In many cases this otherwise moderate interpretation resulted in a decision – for example in the previously mentioned Cohn-Bendit case – that did not state the nature of the infringement committed in the context of obviously false information disseminated by the media. This interpretation provided the basis for the practice according to which complaints about public media – that is 80 percent of all complaints about the media – never result in condemnation.

Furthermore, according to the Authority's consistently applied point of view, the 'law protects diversity of opinions in order to bring about a democratic public opinion and help debate public affairs rather than protecting those the representatives of particular opinions'. This interpretation is a major instrument in preventing an extremist party, Jobbik – against which most complaints are filed –, from having too much leeway in shaping public opinion. All this shows that this legal institution has become ineffective and is incapable of contributing to the process of creating democratic public opinion; in fact, it may even serve to open up the possibility for extremist voices to be heard in the media.

4. Due diligence guidelines for journalists

In terms of the practice of how the law is applied in Hungary, Position Statement No. 14 PK of the Supreme Court's Civil Division is of pre-eminent importance. This mandates that

"an incorrect claim of fact must be corrected even if the respective information is from an outside source. A correction may be required in the case of disseminating incorrect claims not only in the context of communicating information gathered through direct observation, but also based on information obtained through other sources, interview subjects, reporting on others' opinions, written statements and hearsay."

Judicial practice construes the objective responsibility of the press broadly, yet in some cases that are relevant precisely in the context of the issue discussed here, there are instances when the press institution in question is exempt from such a responsibility. Hence there is no requirement to issue a correction and the press is exempt from responsibility if it disseminates accurate information concerning the contents of a bill of indictment, a public hearing or a non-binding judgment before the criminal proceedings reach a final decision. In such cases, a press correction is not required even if it subsequently emerges that the previously made statement was false. All the press outlet needs to show is that based on the information or documents available during the proceedings, the information disseminated was accurate and credible; the press' burden of proof does not extend to the veracity of the claims it has disseminated. At

the same time, the coverage may not state as a factual statement that a person is the perpetrator of a criminal offence as long as his/her trial as a defendant is still ongoing.

Judicial practice has extended the applicability of Position Statement No. 14, which originally only applied to criminal proceedings, to civil suits and disciplinary proceedings, if the press statement corresponds to the proceedings. The press is not obligated to verify the factual accuracy of factual claims stated at police press conferences. A press publication that accurately reports statements made by the police at a press conference does not violate the presumption of innocence or privacy rights.

The legislator has laid out the rules concerning the presence of the press at court hearings, and image and/or audio recordings made by the press in that context, in two separate procedural codes; the legislator intended for the two to be similar in how they regulate these issues. This legislative aspiration was not successfully implemented, however, since even though they originally sought to incorporate the rules that were enacted in the act on criminal procedure into the framework of civil procedure, this was not comprehensively realised. *Act V of 2013 on the Civil Code* makes provisions concerning the protection of recordings of one's image and voice.

Art. 2:48. [The individual's right to recordings of one's image and voice]

(1) It is necessary to obtain the consent of a person before making a recording of his/her image or voice, or to use the recordings.

(2) It is not necessary to obtain the consent of a person before making a recording of his/her image or voice, or to use these recordings, when the recording was made in the context of recording a mass scene or in the framework of recording public appearances.

It is necessary to obtain the consent of a person to record his/her image or voice. It is not necessary to obtain such consent, however, when the recording pertains to a mass scene or a public appearance. Hungarian law does not lay down specific requirements as to what form consent must take (in other words there is no requirement that it must be provided in writing), and consent may be provided orally or even implicitly through action that implies consent. One form of implicit consent according to Hungarian jurisprudence may be if someone is aware of the fact that a recording was made, as well as of its purpose, and does not protest against it. Nevertheless, the obligation to show that consent was given is always incumbent on whoever makes the recording or uses it, regardless of what form the recording takes. Any use without the consent of the person depicted, exceeding the scope of the consent provided, or a use that derogates from the authorised uses constitute a breach of the law, however. Images of public figures recorded in connection with public

appearances may be used without consent.

The relevant provisions of Act III of 1952 are as follows:

Recordings of hearings

Art. 134/A. (1) Visual and/or audio recordings of public hearings may be made – in the manner specified by the court – without temporal limitations.

(2) At a public hearing, the press may make recordings of the images and/or voices of the members of the court, the clerk and the prosecutor.

(3) With the exception of the prosecutor, visual or audio recordings of the parties and other persons involved in the trial; their representatives; witnesses; experts; the interpreter; or the owner of an object displayed during the proceedings may only be made with the consent of the person involved. If necessary, the court can ask the persons affected whether they consent to have their images and/or voice recorded; such a request must be recorded in the minutes, together with the contents of the statement made by the persons affected. In the absence of legal regulations stipulating otherwise, even without the consent of the persons affected, it is allowed to make visual and/or audio recordings of persons discharging central government or municipal government responsibilities, or persons discharging other public responsibilities laid down in law, if the persons involved are engaged in the performance of the aforementioned responsibilities.

(4) As part of his/her responsibility for maintaining public order at the hearing, in the course of the latter the presiding judge is responsible for ensuring the protection of the privacy rights of the persons specified in paragraph (3).

Act XIX of 1998 on criminal procedure, which came chronologically before the previously discussed provisions, regulates this issue in the following manner:

Providing information and informing the public during criminal proceedings

Art. 74/A (1) Until the conclusion of the investigation, information to the press may be conveyed by the following: a representative of the investigative authority who is authorised to perform such actions based on another law or by the prosecutor; until charges have been filed, the prosecutor or a person designated by the prosecutor; during the court proceedings, a person who is authorised to do so pursuant to the act on the legal status and remuneration of judges. (The relevant provisions are laid down in *Act CLXII of 2011 on the legal status and remuneration of judges*, under the heading *Statements*.)

(2) The press is authorised to disseminate information about the court's public proceedings.

(3) The dissemination of information to the press must be denied if it would violate the requirement to protect classified data (secret of the state), or if it would otherwise jeopardise the successful conduct of the proceedings.

Art. 74/B (1) In the interest of informing the public, audio and/or visual recordings of the court hearing may be made with the permission of the presiding judge, while recordings of persons who participate in the hearings may only be made with the consent of the affected individuals, with the exception of the members of the court, the clerk, the prosecutor or the defence lawyer. In the interest of ensuring the continuity of the hearings and their undisturbed conduct, the presiding judge may deny this permission, or may revoke it during any segment of the court proceedings.

(2) The press may not disseminate information about closed hearings or those segments of a hearing from which the court has excluded the public. Nor may information be provided to the press if the public was excluded pursuant to Article 245 (5).

(3) Unless the law provides for an exception, only a person properly authorised by law may be given access to review the documents pertaining to an ongoing or concluded criminal case.

(4) A document under paragraph (3) may be researched before its term of protection expires, in accordance with the rules established concerning research on public archives, which are laid down in the act on the protection of public documents and other materials in public archives and private archives.

(5) Apart from an instance as defined by Art. 74/A, information about a proceeding may be provided to persons with a legal interest in the conduct of the proceedings or their outcome. Until charges have been filed, the authorisation to review documents is issued by the prosecutor, and he/she also disseminates the necessary information; during court proceedings, the aforementioned actions are performed by the presiding judge – once the underlying legal interest of the party requesting information has been verified.

Act CLXII on the legal status and remuneration of judges devotes a separate section to the issue of who is authorised to issue statements and disseminate information.

Statements

Art. 43 A judge may not publicly comment outside his/her official capacities on proceedings before the court, especially in respect of cases that he/she is charged with adjudicating.

Art. 44 (1) A judge may not make a statement to the press, radio or television on cases he/she is charged with adjudicating.

(2) The presiding judge or a person commissioned by the latter may provide information to the press, radio or television about a case pending in court or a case previously concluded by the court.

While the principal rule in a criminal proceeding is that audio and/or visual recordings may be made with the authorisation of the presiding judge, in a civil proceeding there is no need for such an authorisation to make recordings, for here the court may only make a determination what method may be used to make an audio and/or visual recording, but it cannot make a decision on the possibility of making a recording. Naturally, this, too, only applies to public proceedings. It is obviously disallowed to make audio and/or visual recordings at closed hearings, for the press is not allowed to attend such hearings. Both statutes make audio and visual recordings contingent on the permission/consent of certain persons involved in the legal proceedings, but recordings of the judge, the prosecutor, the defence lawyer or the clerk are not subject to such conditions. There is also a difference in the two regulations in that in a civil proceeding the occurrence of a permission/consent must be noted in the minutes, while the rules on criminal procedure do not contain any provisions to regulate this issue. Nevertheless, it is obvious that the absence of provisions does not imply that a court may not order that such acts be recorded in the minutes. The civil procedure already refers to persons who hold public positions and who appear in public in the actual performance of their public responsibilities, laying down that these persons may be recorded without authorisation. Such a clause has not yet been included in the Code of Criminal Procedure. In instances when this would give rise to a disruption of the hearings, recordings may be prohibited according to either procedural code.

The presumption of innocence is one of the foundations of democratic constitutional regimes. The Hungarian legislator has laid out the relevant legal framework in several statutes:

Article XXVIII (2) of Hungary's Fundamental Law (the Hungarian constitution) stipulates that "[n]o one shall be considered guilty until his or her criminal liability has been established by the final decision of a court."

This is complemented by the relevant provisions of *Act XIX of 1998 on criminal proceedings*, above all the declaration on the presumption of innocence; but one might also mention the requirements concerning the burden of proof.

Article 7. No one shall be considered guilty until his/her criminal liability has been established by the final decision of a court.

§ (2) Any factual claim not proved beyond doubt may not be construed to the detriment of the defendant.

5. Liability in the editorial chain

There are no specific rules on the differentiated liability of the media players in the Hungarian (media) law. The media law declares only that media content providers are vested with independent decision-making rights within the framework of the law concerning the publication of media content, and they assume responsibility for abiding by the provisions of the law. Their liability does not affect the liability of persons supplying information to the media content provider, nor to the persons the media content providers employ under contract of employment or some other form of employment relationship involved in the preparation of the media content.⁹²⁷

In the practice it means that the liability can be established according to the general civil law and criminal law rules. Neither of them rule out the parallel liability of the journalist, the responsible editor and the interviewee. If the editor's behaviour fulfils the conditions of the civil⁹²⁸ or criminal⁹²⁹ liability, he/she also can be sentenced to damage or criminal law sanction. In a 2004 libel case the court sentenced both the journalist and the newspaper's editor-in-chief to suspended prison sentences "in light of the substantial gravity of the act which substantially exceeds" what might be considered the average gravity of such offences.⁹³⁰

Subjects of the media law sanctions⁹³¹ – applied by the Media Council – are the media providers (audiovisual and radio media service providers, providers of press products). They are responsible to fulfill the media law rules and they bear the consequences of the violations. As an exception, in case of repeat offenders, the Media Council is entitled to impose a fine upon the executive officer of the infringing entity in an amount up to two million forints, consistent with the gravity and nature of the infringement and the circumstances of the case.

There is a special limitation on the media provider's and journalist's liability in the media law⁹³²: media content providers and persons employed by media content providers under contract of employment or some other form of employment relationship cannot be held responsible for any

⁹²⁷ Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content Section 21.

⁹²⁸ Act V of 2013 on the Civil Code Book Six Chapter Four.

⁹²⁹ Act C of 2012 on the Criminal Chapter III.

⁹³⁰ The judgment was rendered while the previous Criminal Code was still effective, but the underlying regulation remained unchanged under the new Criminal Code as well.

⁹³¹ See Act CLXXV of 2010 on Media Services and on the Mass Media Section 187.

⁹³² Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content Section 8.

infringement committed with a view to obtaining information of common interest, where obtaining such information by other means would have been impossible for the journalist in question, or it would have entailed undue difficulties, provided that the infringement committed did not result in unreasonable or grave injury, and that the information obtained was not done so in violation of the Act on the Protection of Classified Information. This entitlement does not constitute an exemption from civil liability for actual damages resulting from the infringement. There is no case law available to this rule, but it ensures basically a broad exemption for the media players.

The Hungarian regulations define the internet responsibilities of intermediaries in accordance with the relevant European regulatory framework.⁹³³ The service provider that relays the information provided by its users through a telecommunications network, or which provides access to this telecommunications network, is not liable for potential damages caused by the transmitted content, assuming that it has no actual influence over the contents of the data stream. The internet hosting service is not responsible for legal violations caused by the information it stores, as long as it has no knowledge of unlawful conduct associated with the information in question. As soon as the service provider learns about the legal violation or circumstances that render such a violation likely, it must immediately undertake to have the information in question removed. In one case a Hungarian court determined that a service provider that had provided the possibility of uploading song lyrics did not bear any civil law liability for users uploading the lyrics of a defamatory song to its service. Failing to remove infringing content can result in the internet hosting service's liability for the legal violations caused by the stored information.⁹³⁴ The law regulates the legal liability of search engines in the same way.

One of the most important phenomena of the past years is the appearance of proceedings initiated in response to comments posted on the internet. In several cases such proceedings were initiated by politicians, and in fact not only against commenters, but also against those operating the websites where the impugned comments appeared.⁹³⁵ A court established the liability of a website operator in a civil law suit, arguing that the content

⁹³³ Articles 7-12 of Act CVIII of 2001 on certain issues concerning electronic commerce services and information society services.

⁹³⁴ See the previous chapter on the legal construction of internet comments.

⁹³⁵ See *Attila Mong: Várjuk Papcsák Ferencet a bejáratnál!* [Ferenc Papcsák please report at the entrance!] <http://mertek.hvg.hu/2012/11/17/varjuk-papcsak-ferencet-a-bejaratnal/>; *Mong Attila: Rágalmazni csak pontosan, szépen...* [When slandering, please be accurate and elegant] <http://mertek.hvg.hu/2013/04/12/ragalmazni-csak-pontosan-szepen/>.

provider disseminates the commenter's communication. Nevertheless, the court did not require the service provider to pay damages. Those would only be assessed if the service provider failed to proceed in a way that complies with its professional duties as they apply to the given situation. In 2014, the Constitutional Court dismissed the constitutional complaint of the Association of Hungarian Content Providers and concluded that websites are responsible for the content of comments posted on them, regardless whether they moderate comments or not, whether they actively remove the harmful content or not, and whether the user is identified or not.⁹³⁶

6. Conclusion and perspectives

The changes of the legal framework have made the work of the investigative journalists less predictable since 2010. The new media law, the new law on freedom of information, as well as the new Civil Code contain some new and unclear restrictions. Moreover, the legislation reacts to any supposed or real problem really vehement with new rules. However, the legal frame do not make the investigative journalism impossible. There was no (published) case on illegal interception of journalists or perquisition of editorial offices, and there was no serious punishment against journalists, either by the media authority or the court.

Indeed, there are some legal instruments that provide better conditions for investigative journalism, first of all in connection with the disclosure of the source of information (what was not an issue of this analysis). There is also a general exemption from journalist's responsibility in the law, regarding the infringements committed with a view to obtaining information of common interest.

The legal frames of the freedom of information have ensured effective means for obtaining (public) information until the latest amendment of the law. The amendment from 2015 made the data requests more complicate, costly and risky.

According to the Constitutional Court, the process of classifying data as an exception from the freedom of information needs to be subject to a substantive review. The amendment of the act on freedom of information made it clear, that the National Authority for Data Protection and Freedom of Information is authorized to initiate the termination of the classification by the classifier.

The Constitutional Court made it clear that the publishing of the faces of police officers depicted in the performance of their duties does not offend the personality rights. With its decision, the Court finished an uncertain

⁹³⁶ Decision of the Constitutional Court Nr 19/2014. (V. 30.) AB.

legal situation.

The media law entitles the Hungarian media authority with broad competences to investigate the activity of media providers. These competences can have a chilling effect on the journalism even if they are practically not applied.

Taking into consideration that the rules of video recording during the trials are determined differently by the civil procedure and criminal procedure, some uncertain situations may develop. A separate problem which may occur occasionally is the enumeration of the members of the audience especially the press staff by the judicial personnel. However, the liability for damages is clearly regulated by the below mentioned case law.

Related to the balanced press coverage - as the Venice Commission stated - "it is questionable whether 'balance' should become an enforceable legal obligation of every particular media taken alone. The norms under consideration create a very complex obligation on the media and lack precision." This is why the Commission recommends to the Hungarian authorities to approve new policy guidelines on the application of this provision in order to secure an easier way of law enforcement.